STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURRAY, P.J., AND METER and OWENS, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TMANDO ALLEN DENSON,

Defendant-Appellant.
_____/

Supreme Court
No. 152916

Court of Appeals
No. 321200

Circuit Court
No. 15-032919-FH

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PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

Contents

TABLE OF CONTENTS i
INDEX OF AUTHORITIES iii
JUDGEMENT APPEALED FROM AND RELIEF SOUGHT v
COUNTER-STATEMENT OF QUESTIONS PRESENTED vii
COUNTER-STATEMENT OF FACTS 1
I. Facts 1
II. Verdict and Sentence 13
ARGUMENT 15
I. In order to establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Defendant abandoned the challenge to the effectiveness of trial counsel by failing to raise the issue in the court of appeals. To the extent that Defendant has raised the issue of ineffective assistance of appellate counsel, that claim fails on the merits because trial counsel provided effective assistance of counsel and appellate counsel appropriately focused Defendant's appeal on seven other issues as a matter of professionally reasonable strategy... 15
a. Issue Preservation 15
b. Standard of Review 15
c. Argument 16
II. Defendant failed to raise the issue of ineffective assistance of trial counsel before the court of appeals. This issue was therefore abandoned and Defendant cannot now raise it on direct appeal before this court. Nonetheless, for the reasons addressed in Issue I, appellate counsel was not ineffective in failing to raise the issue on appeal and Defendant suffered no prejudice. ... 24
a. Issue Preservation 24
b. Standard of Review 24
c. Argument 25
III. The trial court did not abuse its discretion when it ruled on Defendant's motion for new trial without first holding an evidentiary hearing. The trial court found that even if defense counsel's performance fell below an objective standard of reasonableness, Defendant suffered no prejudice from the mistakes alleged by Defendant. 27
a. Issue Preservation 27
b. Standard of Review 27
c. Argument 28
IV. The trial court did not abuse its discretion when it found that Christina Delikta was not qualified, based on a lack of education, training, and experience, to testify as an expert witness to opine on why victims of sexual assault feel guilty and say they are sorry. 29
a. Issue Preservation 29

b. Standard of Review 29

c. Argument 29

V. The trial court properly instructed the jury as to evidence of flight where defendant fled the crime scene and did not immediately report the alleged assault on his daughter until he was confronted by his parole agent two days later. 32

a. Issue Preservation 32

b. Standard of Review 32

c. Argument 32

VI. Defendant was not denied the right to an impartial jury merely because one juror attended Mott college at the same time Shamark Woodward and Diamond Denson were high school students there. The juror did not improperly fail to disclose during voir dire that he was a student at Mott College when the question was never asked and Defendant has failed to present evidence that the juror knew any of the witnesses or was biased toward or against either party. 36

a. Issue Preservation 36

b. Standard of Review 36

c. Argument 36

VII. The special assistant prosecutor did not engage in prosecutorial misconduct and did not suppress exculpatory evidence. Defendant did not preserve this claim and does not set forth law and facts to support a claim that the prosecutor committed error or misconduct. 38

a. Issue Preservation 38

b. Standard of Review 38

c. Argument 39

VIII. Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible when relevant to establish any purpose other than that the defendant committed the present crime because he is a person of bad character. Admission of defendant's prior act of anger and use of excessive force were admissible under MRE 404(b) as material and relevant to prove that the intent and modus operandi related to defendant's claim of self-defense was not believable. Defendant's bad temper was corroborative of Woodward's testimony that defendant reacted in anger and assaulted him with excessive force in this case. 41

a. Issue Preservation 41

b. Standard of Review 41

c. Court of Appeals Ruling 41

d. Argument 42

RELIEF 49

APPENDIX x

INDEX OF AUTHORITIES

Cases

Booth Newspapers, Inc v Univ of Michigan Bd of Regents, 444 Mich 211; 507 NW2d 422 (1993) 15, 24, 27, 36
Gilbert v DaimlerChrysler Corp, 470 Mich 749; 685 NW2d 391 (2004) 29
People v Bartlett, 231 Mich App 139; 585 NW2d 341 (1998) 32
People v Brown, 294 Mich App 377; 811 NW2d 531 (2011) 38
People v Burwick, 450 Mich 281; 537 NW2d 813 (1995) 39
People v Caballero, 184 Mich App 636; 459 NW2d 80 (1990) 19
People v Carbin, 463 Mich 590; 623 NW2d 884 (2001) 18
People v Carines, 460 Mich 750; 597 NW2d 130 (1999) 27, 36, 38
People v Cipriano, 238 Mich 332; 213 NW2d 104 (1927) 33
People v Coleman, 210 Mich App 1; 532 NW2d 885 (1995) 32
People v Compeau, 244 Mich App 595; 625 NW2d 120 (2001) 32
People v Crawford, 458 Mich 376; 582 NW2d 785 (1998). 42, 43, 46
People v Cutchall, 200 Mich App 396; 504 NW2d 666 (1993) 33
People v Dobek, 274 Mich App 58; 732 NW2d 546, 564 (2007). 32
People v Gaines, 306 Mich App 289; 856 NW2d 222 (2014) 46
People v Ginther, 390 Mich 436; 212 NW2d 922 (1973) 15
People v Gioglio (On Remand), 296 Mich App 12; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864; 820 NW2d 922 (2012) 17, 25
People v Grant, 470 Mich 477; 684 NW2d 686 (2004) 18
People v Hardiman, 466 Mich 417; 646 NW2d 158 (2002) 22
People v Heft, 299 Mich App 69; 829 NW2d 266 (2012) 16, 25
People v Heikkinen, 250 Mich App 322; 646 NW2d 190 (2002) 32
People v Hoag, 460 Mich 1; 594 NW2d 57 (1999) 17, 25
People v Jordan, 275 Mich App 659; 739 NW2d 706 (2007) 15
People v Knox, 469 Mich 502; 674 NW2d 366 (2004) 42
People v LeBlanc, 465 Mich 575; 640 NW2d 246 (2002) 15, 24
People v Leo, 188 Mich App 417; 470 NW2d 423 (1991) 39
People v Lukity, 460 Mich 484; 596 NW2d 607 (1999) 47
People v Magyar, 250 Mich App 408; 648 NW2d 215 (2002) 42
People v Mardlin, 487 Mich 609; 790 NW2d 607 (2010) 43
People v McElhaney, 215 Mich App 269; 545 NW2d 18 (1996) 38
People v Mette, 243 Mich App 318; 621 NW2d 713 (2000) 36
People v Orr, 275 Mich App 587; 739 NW2d 385 (2007) 41
People v Payne, 285 Mich App 181; 774 NW2d 714 (2009) 16, 25
People v Petri, 297 Mich App 407; 760 NW2d 882 (2008) 15, 23, 24
People v Pickens, 446 Mich 298; 521 NW2d 797 (1994) 16, 25
People v Reed, 449 Mich 375; 535 NW2d 496 (1996) 23
People v Rodriguez, 463 Mich 466; 620 NW2d 13 (2000) 32
People v Russell, 297 Mich App 707; 825 NW2d 623 (2012) 19
People v Sabin (After Remand), 463 Mich 43; 614 NW2d 888 (2000) 41, 43
People v Snider, 239 Mich App 393; 608 NW2d 502 (2000) 23

People v Stokes, 312 Mich App 181; 877 NW2d 752 (2015) 19
People v Ullah, 216 Mich App 669; 550 NW2d 568 (1996) 39
People v Unger, 278 Mich App 210; 749 NW2d 272 (2008) 22, 27, 32, 33
People v Uphaus, 278 Mich App 174; 748 NW2d 899 (2008) 17
People v VanderVliet, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) .. 43
People v Vaughn, 491 Mich 642; 821 NW2d 288 (2012) 16, 25
People v Waclawski, 286 Mich App 634; 780 NW2d 321 (2009) 41
People v Williams, 268 Mich App 416; 707 NW2d 624 (2005) 22
People v Yost, 278 Mich App 341; 749 NW2d 753 (2008) 30
Woodard v Custer, 476 Mich 545; 719 NW2d 842 (2006) 29

Statutes

MCL 769.26 47

Rules

CJI2d 4.4 ..... 33, 35

MCR 2.613(A) 47
MCR 2.613(C) 15, 24

MRE 104(a) 29
MRE 105 42
MRE 401 43
MRE 402 42
MRE 403 ..... 42, 46
MRE 404(b) ..... passim
MRE 404(b)(1) 42
MRE 702 ..... 29, 31

JUDGEMENT APPEALED FROM AND RELIEF SOUGHT

Defendant has filed an Application for Leave to Appeal the Court of Appeals' unpublished decision, affirming his jury conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. *People v Denson*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2015 (Docket No. 321200). (Appendix 1.) This Court directed the Genesee County Prosecuting Attorney to respond, asking the Prosecuting Attorney to pay particular attention to Defendant-Appellant's argument that evidence of a prior act of violence was inadmissible under MRE 404(b). *People v Denson*, order of Michigan Supreme Court, issued June 22, 2016 (Docket No. 152916). (Appendix 2.)

Defendant's conviction arose from an incident that occurred at his family's home in the City of Flint on October 22, 2012. Defendant discovered the victim, 17-year-old Shamark Woodward, and Defendant's 15-year-old daughter, Diamond Denson, together in Diamond's bedroom in a state of partial undress. Defendant reacted swiftly and violently, punching and kicking and knocking Woodward around in what Defendant described as an exercise of defense of his daughter and of himself. Woodward and Defendant gave different accounts of what happened next, but the result of the encounter was Defendant's hands and forearms were injured and Woodward was battered by fists, shod feet, a lamp that was broken over his head, and several long knife wounds carved into his back and requiring over 20 stitches and staples to close. Whether Defendant's assault began as a justified attack under a reasonable belief that it was necessary to keep Woodward from assaulting Diamond or Defendant, the knife wounds were unexplained by Defendant's description of events and consistent with Woodward's claim that they were a means of retribution against him and Defendant's act to teach a lesson to his daughter.

The Court of Appeals decision to affirm Defendant's conviction was correct. The Court of Appeals correctly ruled that Defendant's conviction was supported by the evidence, specifically that the great bodily harm inflicted upon Woodward was not justified as self-defense. The use of evidence of Defendant's previous assault of another individual in 2002 was properly admitted under MRE 404(b). Testimony from the treating physician and his reference to pertinent medical records relied upon by him in his treatment of Woodward's wounds were properly admitted. Evidence that Woodward was not granted immunity from possible future prosecution for sexual assault was not relevant to his credibility and was properly excluded by the trial court. Diamond's sexual assault counselor was not properly qualified to testify as an expert witness. The trial court properly instructed the jury as to evaluation of evidence of Defendant's possible flight from the scene of the crime. And that cumulative error did not deprive Defendant of his right to a fair trial.

Accordingly, for the reasons discussed *infra*, the People of the State of Michigan respectfully request this Honorable Court deny leave to appeal because the Court of Appeals' decision was correct, the issues presented in Defendant-Appellant's Application lack merit and are not issues that need to be addressed by this Court and because Defendant received a fair trial.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether Defendant received effective assistance of appellate counsel where trial counsel provided effective assistance of counsel and appellate counsel appropriately focused Defendant's appeal on seven other issues as a matter of professionally reasonable strategy?

Defendant-Appellant: answers this question, "No."

Plaintiff-Appellee: answers this question, "Yes."

The Court of Appeals: did not answer this question.

The Trial Court: did not answer this question.

II. Whether Defendant abandoned the issue of ineffective assistance of trial counsel by failing to raise the issue before the court of appeals after the trial court had ruled Defendant received effective assistance of counsel?

Defendant-Appellant: answers this question, "No."

Plaintiff-Appellee: answers this question, "Yes."

The Court of Appeals: did not answer this question.

The Trial Court: answered these questions, "Yes."

III. Whether the trial court properly exercised its discretion when it ruled on Defendant's motion for new trial without first holding an evidentiary hearing, given that the trial court found that even if defense counsel's performance fell below an objective standard of reasonableness, Defendant suffered no prejudice from the mistakes alleged by Defendant?

Defendant-Appellant: answers this questions, "No."

Plaintiff-Appellee: answers this questions, "Yes."

The Court of Appeals: did not answer this question.

The Trial Court: answers this question, "Yes."

IV. Whether the trial court properly exercised its discretion when it found that Christina Delikta was not qualified, based on a lack of education, training, and experience, to testify as an expert witness to opine on why victims of sexual assault feel guilty and say they are sorry?

Defendant-Appellant: answers this question, "No."

Plaintiff-Appellee: answers this question, "Yes."

The Court of Appeals: answers this question, "Yes."

The Trial Court: answers this question, "Yes."

V. Whether the trial court properly instructed the jury as to evidence of flight where defendant fled the crime scene and did not immediately report the alleged assault on his daughter until he was confronted by his parole agent two days later?

Defendant-Appellant: answers this question, "No."

Plaintiff-Appellee: answers this question, "Yes."

The Court of Appeals: answers this question, "Yes."

The Trial Court: answers this question, "Yes."

VI. Whether Defendant's right to an impartial jury was preserved when it was allegedly disclosed after trial that one juror attended Mott college at the same time Shamark Woodward and Diamond Denson were high school students there, given that the juror did not improperly fail to disclose during voir dire that he was a student at Mott College because the question was never asked and Defendant has failed to present evidence that the juror knew any of the witnesses or was biased toward or against either party?

Defendant-Appellant: answers this question, "No."

Plaintiff-Appellee: answers this question, "Yes."

The Court of Appeals: did not answer this question.

The Trial Court: answers this question, "Yes."

VII. Whether Defendant fails to set forth a claim that the prosecutor engaged in misconduct because Defendant did not preserve this claim and does not set forth law and facts to support such a claim?

Defendant-Appellant:	answers this question, "No."
Plaintiff-Appellee:	answers this question, "Yes."
The Court of Appeals:	did not answer this question.
The Trial Court:	did not answer this question.

VIII. Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible when relevant to establish any purpose other than that the defendant committed the present crime because he is a person of bad character. Were defendant's prior act of anger and use of excessive force admissible under MRE 404(b) as material and relevant to prove that the intent and modus operandi related to defendant's claim of self-defense was not believable and evidence of defendant's bad temper was more consistent with the victim's testimony that defendant reacted in anger and assaulted him with excessive force in this case?

Defendant-Appellant:	answers this question, "No."
Plaintiff-Appellee:	answers this question, "Yes."
The Court of Appeals:	answers this question, "Yes."
The Trial Court:	answers this question, "Yes."

COUNTER-STATEMENT OF FACTS[1]

I. Facts

Victim Shamark Woodward's Testimony

On the evening of October 22, 2012, 17-year-old Shamark Woodward II received a text from his 15-year-old girlfriend, Diamond Denson, inviting him to come over to her house at 2111 Illinois Avenue, Flint, Michigan. (TT I, 136-140). Woodward walked to Diamond's house where they talked to each other in the living room, followed by kissing and hugging. (TT I, 140-141). When they heard a car pull into the driveway, which Diamond said was her dad, Diamond suggested that they both go upstairs to her room where they sat around and talked some more. (TT I, 141-144; TT II, 28-29). Woodward testified Diamond stated that they should "do it," and they started to get intimate with one another (which he described as hugging and kissing), and both had taken off their pants and underwear. (TT I, 144-145; TT II, 8). They did not have sexual intercourse. (TT II, 8). Diamond never told Woodward to stop doing what he was doing and she never screamed out for help from her father. (TT II, 52). Both were half naked when they heard the doorway to the stairs open and heavy footsteps as Diamond's father, Defendant Tmando Denson, came up the stairs. (TT I, 145, 148). According to Woodward, Diamond jumped up and put on her bottoms while he sat there in the middle of the room in shock. (TT I, 145).

Woodward testified that Defendant first asked him his name and how old he was and then, after Woodward answered him, Defendant struck Woodward in the side of the head with his fist.

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[1] The People abbreviate and cite the transcripts in this case within this Brief as follows:
Motion hearings: (date) Hrg Tr.
Trial transcripts: TT I – Trial Volume I, January 22, 2014; TT II – Trial Volume II, January 23, 2014; TT III – Trial Volume III, January 24, 2014; TT IV – Trial Volume IV, January 28, 2014; TT V – Trial Volume V, January 29, 2014; TT VI – Trial Volume VI, January 30, 2014; TT VII – Trial Volume VII, January 31, 2014; TT VIII – Trial Volume VIII, February 3, 2014.
Sentencing Transcript: S.

(TT I, 150-151). Woodward fell onto the bed and Defendant continued to pummel his head with his hands and stomped on Woodward's head with his foot. (TT I, 151). Defendant then grabbed a lamp and bashed Woodward's head several times until the lamp shattered, causing a bleeding gash in Woodward's head. (TT I, 151, 157). Defendant threw the lamp at Woodward and next tried to hit him with a chair. (TT I, 151). When Diamond tried to intervene, Defendant pushed her back and struck her. (TT I, 151).

At that point, Defendant spoke to someone on his cell phone, after which he had Woodward and Diamond take the rest of their clothes off and took pictures of them. (TT I, 152-153). When Diamond protested, Defendant threatened to kill Woodward if she didn't obey. (TT I, 152). Defendant then made a second phone call and threatened Woodward that if he moved, he would kill him. (TT I, 153). Defendant left the room and returned a few minutes later with an ultimatum: he could either deal with Defendant's "homeboys," who would probably kill him, or he could deal with Defendant. (TT I, 153). Woodward chose to deal with Defendant, who had him sit in the corner of the room facing the corner. (TT I, 153). Defendant pulled out two knives and slashed Woodward repeatedly across his back, shoulders, and legs. (TT I, 153, 157; TT II, 79-80). During the ordeal, Defendant told Woodward to kiss his boot, and when he did so Defendant kicked him in the face. (TT I, 153-154). Defendant then had Woodward gather his clothing and he walked him out of the house. (TT I, 155). Once outside, Defendant told Woodward that he did all that to him to teach his daughter a lesson. (TT I, 155).

Woodward testified that during this entire confrontation, he did not make any moves toward Diamond nor did he fight back against Defendant. (TT I, 156, 160). Woodward denied having a weapon at any time and denied Defendant's version of events that entailed him running down to the kitchen and obtaining a knife from the kitchen or throwing anything at Defendant. (TT

I, 160; TT II, 10). Woodward removed his shirt in court and showed his scars to the jury, including the knife cuts across his back, on his head, and on his leg. (TT I, 160-164).

When Woodward arrived home, he told his brothers what had happened and they took him to the hospital. (TT II, 6-7). He was in shock and felt dizzy. (TT II, 7). Woodward received eight staples in his head, one stitch in one scar, seven in another, and 21 across his lacerations. (TT II, 8). The next morning, Woodward's mother, Anoopa Woodward, took photographs of Woodward's injuries. (TT II, 13). Photos of Woodward's face, head, back, leg, shoulder, ear, neck and arm—showing injuries inflicted by kicking, cutting, slashing and being struck by a shoe—all were admitted into evidence. (TT II, 13-19).

Victim's Medical Treatment

Dr. Faisal Mawri testified at trial regarding the treatment of Woodward's injuries based on his own personal observations of Woodward at the hospital on the night of the incident. Dr. Mawri was a pediatric emergency medicine physician at Hurley Medical Center. (TT II, 81). At trial, defendant objected to qualifying Dr. Mawri as an expert witness because he had not produced a CV. The court allowed the witness to produce a copy of his CV for defense counsel, after which Dr. Mawri was qualified as an expert in emergency medicine without further objection. (TT II, 85-90).[2] Dr. Mawri testified that he was Woodward's attending physician when he came into the emergency room on October 22, 2012. (Id.). When he approached Woodward, he appeared to be dazed and in a state of shock, with multiple lacerations on his body and with a huge laceration on his scalp. (Id.). He watched as Woodward's wounds were cleaned, sutured and stapled. (Id.). Dr. Mawri observed a huge wound on the back of Woodward's skull that required seven staples to close. (TT II, 91). He saw a 5 centimeter laceration wound on Woodward's back that required 9

[2] Defendant does not challenge this ruling on appeal.

sutures to close. (Id.). He observed another 8 centimeter laceration, which he described as a huge cut, on Woodward's right arm that took 5 sutures. (Id.). In all, Woodward's treatment—which Dr. Mawri observed—required a total of 15 sutures and 7 staples. (Id.).

Dr. Mawri acknowledged that there was a resident working under him on this patient named Dr. Tammy Chen. (TT II, 91-92). Dr. Mawri watched as Dr. Chen performed the suturing and stapling of the wounds. (TT II, 92). Dr. Mawri testified that based on his observations, Woodward's injuries were of the type that could seriously harm the health or function of the body. Particularly, if the wounds were not cleansed and sutured very quickly, they could have secondary infections and lead into other complications, including inflammations of the bone. (TT II, 92-93).

At that point in Dr. Mawri's testimony, Woodward's medical chart that was created and maintained in the ordinary course of business was admitted without objection as exhibit 9. (TT II, 93). Dr. Mawri testified that he actually reviewed and prepared Woodward's chart with Dr. Chen and everything in the document took place that night. (TT II, 93-94). Dr. Mawri testified that Woodward's chart indicated that he gave a medical history of being an assault victim, assaulted by a male, and that he was struck with fists, a chair and a kitchen knife. (TT II, 94). The lacerations noted in the chart were consistent with those observed and testified to by Dr. Mawri. (Id.). Dr. Mawri concluded his direct examination by agreeing that the lacerations on Woodward's back and arms were consistent with a sharp object, such as a knife. (TT II, 95-96).

On cross examination, defense counsel impeached Dr. Mawri with alleged inconsistencies between the report and Dr. Mawri's testimony. (TT II, 95-99). Particularly, defense counsel noted that the medical chart did not indicate Woodward was "dizzy," as Dr. Mawri had testified, even though that would have been important to note with a head injury. (TT II, 97-99). In fact, the medical records indicated that Woodward did not lose consciousness. (TT II, 99). Dr. Mawri

testified that he noticed bleeding, although the ER nurse indicated in the record that there was "no bleeding noted." (TT II, 102-103). Dr. Mawri testified he is familiar with this particular patient and looking at the medical records refreshed his memory as to his appearance and injuries. (TT II, 103). He testified that Woodward's injuries were not life-threatening, but were typical injuries from being beaten up. (TT II, 105-06). And if untreated, the nature of Woodward's injuries posed a danger to the health and function of Woodward's body. (TT II, 111). Defense counsel impeached Dr. Mawri's testimony by emphasizing that he sees 120 patients a day in the ER and questioned the assertion that these medical records—especially in light of their inconsistencies—were able to refresh the doctor's memory 15 months after the fact. (TT II, 103-104).

Observations of Victim's Injuries

Shamark Woodward's mother, Anoopa Woodward, testified that on October 22, 2012, she went to Hurley Hospital and visited Woodward in the emergency room. (TT II, 120-121). She observed that her son was noticeably shaken and appeared to be in shock. (TT II, 121). His face was all bruised and swollen and his head was gashed open on top. (TT II, 121). She observed cuts on his arms and back, scrapes on his legs, cuts on his hands, and bruising about his face mouth and one side of his head. (TT II, 122). He did not have any cuts on the front of his body. (TT II, 123).

Officer Wesley Suttles spoke to Woodward at the hospital on October 22, 2012. (TT II, 158). Officer Suttles noted that the right side of Woodward's face was red and swollen, and he observed two long vertical lacerations on Woodward's back and a small laceration on his head. (TT II, 169).

The ER nurse who assessed Woodward on the night of October 22, 2012 testified that he was very distraught. (TT III, 19-23). He was slow and delayed in his affect, but was able to answer all of her questions. (TT III, 22-24, 27). She noticed his injuries and saw blood, and she asked

Woodward what happened. (TT III, 27). Woodward told her Defendant came into the room and attacked him, causing the injuries. (TT III, 27).

Defendant's Son, Tmando Denson, Jr.

Defendant's twelve-year-old son, Tmando Denson-El, Jr., testified that on October 22, 2012, he was living at 2111 Illinois Avenue, Flint, with his mom, his brother Yoshua, and his sister Diamond. (TT II, 198-199). He and his brother were getting ready to watch the Lions' game on television in the basement. (TT II, 199-200). Diamond was not in the basement. (TT II, 200-201). He said he called his father on the phone and told him to come over because the Lions' game was coming on. (TT II, 201-202). While watching the game, they heard a loud noise that he imagined to be the front door being kicked in. (TT II, 203). Defendant told him and his brother to stay downstairs and went upstairs to check it out. (TT II, 203). He heard arguing from upstairs, but did not see anything further. (TT II, 204).

Diamond Denson's Report to Officer Kendall

Officer Cedric Kendall worked as a Mott Community College police officer where both Woodward and Diamond Denson attended high school. (TT II, 179-180). As the liaison officer, he was asked to speak to both students and their parents to check on their welfare. (TT II, 180-181). When he met with Diamond, she appeared to be uncomfortable and kept looking at her mother. (TT II, 186, 193). When his partner, Officer Terry Coon suggested that maybe Officer Kendall could speak to Diamond without her mother present, the mother declined, stating, "No, she's fine with me here." (TT II, 187). It was clear Diamond's mother did not want Officer Kendall speaking to Diamond alone. (TT II, 187). Diamond did not say anything to Officer Kendall about being forced to do anything by Woodward, and she did not say anything about screaming for help

or for her father. (TT VI, 89). Diamond also did not mention anything about being injured. (TT VI, 89).

Diamond Denson's Testimony

Diamond Denson admitted that she texted Woodward and invited him over to her house on October 22, 2012. (TT III, 44-45). She invited Woodward into the house and they sat talking on the living room couch while her brothers were downstairs. (TT III, 46). She was not supposed to have a boy over while her parents were gone, so when she heard her aunt's car and saw Defendant and her aunt outside, she told Woodward to go upstairs to her bedroom. (TT III, 42, 47). She closed her bedroom door and went downstairs to let Defendant into the house. (TT III, 48). She said she left Defendant in the basement watching television with her brothers and joined Woodward upstairs in her bedroom. (TT III, 49-50). According to Diamond, Woodward took off his jeans and his long-sleeved shirt because he was hot. (TT III, 53-54). Woodward was still wearing black basketball shorts and a white t-shirt. (TT III, 82).

At that point, her story differed from Woodward's testimony. Diamond testified that as she was moving across the room to turn off a lamp that was on a bed-side table, Woodward tripped her and she fell into the wall, making a loud noise and putting a hold in the drywall. (TT III, 55-56; 75-76, 168). She sat back down on the floor next to Woodward and he kissed her, pulling her onto her mattress. (TT III, 82). Woodward attempted to pull down her jogging pants and she started telling him to stop. (TT III, 82-83). When Woodward refused to stop, she claims she yelled "stop, my dad is downstairs." (TT III, 84). She then heard the door to the stairs open and loud footsteps as Defendant came up and pulled Woodward off of her. (TT III, 85). She said Defendant and Woodward started fighting, hitting, pushing, and wrestling. (TT III, 85-86). At one point, Woodward got away and ran downstairs and Defendant gave chase. (TT III, 87, 90). A little while

later, Woodward ran back upstairs followed by Defendant and she heard Woodward ask if he could go home. (TT III, 91). She testified that she did not hear Defendant ask Woodward to kiss his shoe, did not see Defendant kick him in the face, did not see Defendant beat Woodward with his shoe, and did not see Defendant with a knife. (TT III, 92). Once upstairs, Defendant threw Woodward's clothes to him and they walked out of the house. (TT III, 92).

Diamond testified that she and her mom went to the police station a number of times but were never able to speak to anyone to make a complaint. (TT III, 93-94). She spoke to Officer Kendall of the Mott College police the next day at her house with her mother present. (TT III, 94-95). Diamond testified that she freely answered Officer Kendall's questions and she was not reluctant to talk to him at all. (TT III, 97-98). She did admit, however, that when asked to speak to Ofc. Kendall alone, her mother refused. (TT III, 162). And at a later point, she spoke to Sergeant Tracy Ross with her mother present but her mother would not let her speak to the police by herself. (TT III, 165). She spoke to Officer C. Jones at the Flint police department on October 25, 2012 and wrote an incident report. (TT III, 99-100). She also admitted that for a couple of days after the incident she communicated with Woodward by Facebook messages, telling him she was sorry for what happened. (TT III, 104-105). She testified that she knew she wasn't supposed to have company and had she not invited Woodward over, none of that ever would have happened. (TT III, 10).

On cross examination, Diamond agreed that Woodward is not a bad guy and she did invite him over because he was her boyfriend. (TT III, 115). He was a nice boy and she loved him, and she still loved him even after the incident. (TT III, 115, 117). She also agreed that Defendant has a temper. (TT III, 114). She testified that she was living at 2111 Illinois with her mother, father, and two brothers and she didn't know why her brother Tmando, Jr. would have said Defendant

didn't live there. (TT III, 116). During the incident, she never saw Woodward with a knife. (TT III, 117). She denied seeing any cuts on Woodward's back, arm, or shoulder and while she saw him bleeding, she denied seeing blood all over him. (TT III, 143-144). Diamond testified that she didn't go to the police station to report what occurred until after her father was arrested. (TT III, 144, 162). And each time she spoke with police about the incident, her mother was there with her. (TT III, 162).

Diamond agreed that after Defendant pulled Woodward off of her, she was safe. (TT III, 157). After that point, there was no reason for Defendant to hit Woodward in the head with a lamp, hit him with a shoe, cut him with a knife, or humiliate them by taking naked photos of them. (TT III, 158-159). She testified that Defendant did not shove her and slap her while Woodward was in the room. (TT IV, 6). She didn't know whether Defendant stomped on and kicked Woodward, but she denied that Defendant hit him with a lamp. (TT IV, 9). [Defendant admitted to shattering a lamp over Woodward's head. (TT V, 91-92, 97)]. Her Facebook messages with Woodward from the day after the incident were read into the record and admitted as Exhibit 25. (TT IV, 13-18). Among other things, Woodward messaged her that, "I was never scared, just didn't want to get shot or fight him back, or something worse." (TT IV, 17).

Rosemary Denson's Testimony

Defendant's wife, Rosemary Denson, testified that on October 22, 2012, she was working as a nurse in Detroit on a 3:00 p.m. to 11:30 p.m. shift when she received a call from home. (TT IV, 32-33, 35). She called back and spoke to her son and her Daughter Diamond. (TT IV, 35-36, 39). Diamond's voice was shaky and she was crying. (TT IV, 39). She told her that she had let a boy into the house and Defendant came into her room as the boy was trying to hold her down and take her clothes off. (TT IV, 39-40). Because Diamond was crying so much, that was all she could

make out. (TT IV, 40-41). Rosemary worked until 11:30 p.m. and then drove home from Detroit. (TT IV, 41). When she got home, she found Diamond and spoke to her further. (TT IV, 42). Defendant was not at home when she got there, he had left with his sister. (TT IV, 43). Defendant told her he was going to the police, and she also called 911. (TT IV, 44, 46-48). Flint P.D. never sent an officer out to speak to them, but the next day Officer Kendall from Mott College came out to the house. (TT IV, 48-49, 55).

Defendant's Testimony

Defendant testified at trial, giving a different version of what occurred. His version was largely supported by Diamond's testimony, with a few key differences. Defendant stated that on October 22, 2012, he lived at 2111 Illinois Avenue in the City of Flint with his wife and three children. (TT V, 30-31). He and his sister worked in Southfield, and she drove him home that night at 8:00 p.m. (TT V, 32). Diamond met him at the door, and he went down to the basement to watch football with his sons. (TT V, 33-35). While watching the game, he heard a loud noise and went upstairs to investigate. (TT V, 36-39, 83). He then heard Diamond yell "stop," "no," and "what are you doing, my daddy is downstairs." So he ran up the stairs to her bedroom and saw Diamond on the floor and Woodward leaning over her wearing no pants and with his hand inside Diamond's pants. Defendant yelled and began hitting Woodward. They tussled initially before Woodward broke loose and ran downstairs, followed by Defendant. They tussled again in the kitchen and Woodward threw a glass at Defendant, striking him in the hand and causing cuts and a broken finger. (TT V, 40-44, 48-50, 89-92, 97-102, 123). Woodward then ran back upstairs and stated, "just give me my clothes." (TT V, 51-52). At that point, at Defendant's questioning, Woodward gave his name and told him he was 17 years old. (TT V, 53). Defendant gave Woodward his clothes back and Woodward left the house. (TT V, 54-57).

Defendant testified that he went to the Flint Police Department that night, but it was closed. (TT V, 61-62). He tried again to make a report on October 24, 2012, when he learned that the police were looking for him so he turned himself in. (TT V, 67-68, 86). Defendant reported receiving a broken finger, 6 puncture wounds to his right palm, cuts to his biceps, forearm, and wrist, and abrasions, swelling and bruising. (TT V, 69-71, 95-96). Defendant denied telling Diamond or Woodward to undress, taking pictures of them nude, threatening to have Woodward taken care of by his homeboys, or using a knife on him. He testified that he honestly believed Diamond was being sexually assaulted and he was merely protecting his daughter and sons from Woodward, who had a knife. (TT V, 77-79, 80).

On cross examination, Defendant acknowledged that when he went in to speak to his parole officer[3] Jerry Dennis on October 24, 2012, he did not know that he was going to be arrested. (TT V, 86-87, 105). In fact, Defendant testified that he didn't want police contact because he thought he might be in trouble. (TT V, 117). He went into Mr. Dennis's office to explain to him what had occurred and he brought with him a document entitled, "Affidavit."[4] (TT V, 87, 105).

Defendant testified that when he saw Woodward in the room with his daughter he probably kicked him and stomped on him. (TT V, 90-91). He is sure that he beat Woodward with his fists and broke a lamp over Woodward's head. (TT V, 91-92, 97). When asked if he beat Woodward with a shoe, defendant testified that "I don't know what all I beat him with." (TT V, 91).

[3] The fact that Defendant was on parole and that Jerry Dennis was his parole officer were not disclosed to the jury.

[4] This affidavit is the document that Defendant has attached to various pleadings on appeal and is attached as Appendix 3 to this Answer in Opposition to Application for Leave to Appeal.

Rebuttal Testimony

Rosemary Denson's 911 Call

In rebuttal, the 911 supervisor, Starletta Diggs, testified that she did a search of 911 calls related to an alleged sexual assault at 2111 Illinois Avenue made on October 22nd through October 26th. (TT VI, 9, 12). She also did a search based on the callers' phone numbers supplied to her by defense counsel. (TT VI, 13). The first phone call regarding an alleged sexual assault was on October 24, 2012 at 4:00 a.m., which was two days after the incident. (TT VI, 14-15, 21). That first 911 call was placed by Rosemary Denson and was played into the record at trial. (TT VI, 17-21). Rosemary Denson stated to the 911 operator that she was told of the assault that morning, October 24th. (TT VI, 19). The phone call also recorded Rosemary Denson stating that while she was at work, "my husband came over to see the children."

Defendant's Statement to Jerry Dennis

Jerry Dennis testified regarding his contact with Defendant related to the incident involving Defendant and Shamark Woodward. (TT VI, 38). Mr. Dennis testified that he works in law enforcement in Genesee County, and as far as he knows, Defendant first called him on October 24, 2012 to tell him about the incident with Woodward. (TT VI, 39). He told Defendant to come in to see him, but he did not tell Defendant he was going to arrest him. (TT VI, 39-40). Defendant did not surrender himself or turn himself in, but Mr. Dennis did arrest him after he reported what had occurred. (TT VI, 40).

Defendant told Jerry Dennis that he did not contact police the night of the incident because he did not want to have police contact. (TT VI, 42). Defendant said after the incident he went back to his apartment at 524 10th Street in Flint. (TT VI, 42-43). He did not live at the house where the

incident took place. (TT VI, 42). Furthermore, Defendant did not report to Mr. Dennis that he had been injured and he did not see any evidence of injury. (TT VI, 43).

Defendant admitted to Mr. Dennis that he had kicked Woodward in the back of the head and then in the face. (TT VI, 69). He said Woodward had thrown a glass of water in his face, and Defendant admitted that he shattered a lamp over Woodward's head. (TT VI, 70). Defendant told him that Woodward then ran downstairs where he grabbed a steak knife. (TT VI, 70). Defendant also grabbed a steak knife and chased Woodward back upstairs. (TT VI, 70). Woodward threw his knife at Defendant, and Defendant threw his knife back at Woodward. (TT VI, 70-71). The fight continued upstairs until Woodward slid down onto the floor and Defendant told him not to move. (TT VI, 71). Defendant did not call the police, because he didn't want police contact, so he called his sister who came over immediately. (TT VI, 71). When his sister arrived, Defendant escorted Woodward out of the house, checked on his daughter, and then went back to his apartment with his sister. (TT VI, 72). Defendant did not tell Mr. Dennis that his daughter was all panicked and unable to talk nor did Defendant say anything about being injured himself. (TT VI, 72). Had Defendant mentioned that he was injured, Mr. Dennis would have noted it in his report and would have checked to see if there were injuries. (TT VI, 73). He did not see any injuries to Defendant. (TT VI, 73).

II. Verdict and Sentence

The jury convicted Defendant of assault with intent to do great bodily harm less than murder, (TT VIII, 4), and the trial court sentenced Defendant to serve 60 months to 240 months in prison, (S, 29).

Additional pertinent facts and procedural history will be discussed in the body of the People, Plaintiff-Appellee's, Brief, *infra*, to the extent necessary to fully advise this Court as to the arguments raised on appeal.

ARGUMENT

I. In order to establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Defendant abandoned the challenge to the effectiveness of trial counsel by failing to raise the issue in the court of appeals. To the extent that Defendant has raised the issue of ineffective assistance of appellate counsel, that claim fails on the merits because trial counsel provided effective assistance of counsel and appellate counsel appropriately focused Defendant's appeal on seven other issues as a matter of professionally reasonable strategy.

a. Issue Preservation

Defendant raised an allegation of ineffective assistance of counsel in the trial court by filing a motion for new trial and requesting a *Ginther*[5] hearing. The issue was thus preserved for appeal. *People v Petri*, 297 Mich App 407, 410; 760 NW2d 882 (2008). Nonetheless, Defendant did not raise the issue in the court of appeals and the challenge to the effectiveness of his trial counsel was abandoned on appeal. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422, 432 (1993) (issues raised for first time on appeal in Supreme Court not ordinarily subject to review). To the extent Defendant claims that his appellate counsel was ineffective for failing to raise the issue, however, the claim is properly raised before this Court in that context. Because there was no evidentiary hearing, review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

b. Standard of Review

"A claim of ineffective assistance of counsel is a mixed question of law and fact." *Id.* On preserved claims of ineffective assistance of counsel where the trial court finds certain facts in relation to a claim of ineffective assistance of counsel, those findings are reviewed for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Whether the facts

[5] *People v Ginther*, 390 Mich 436, 212 NW2d 922 (1973).

establish ineffective assistance of counsel involves a question of constitutional law, which is reviewed *de novo*. *Id.*

c. Argument

Controlling Law

In order to prove that defense counsel provided ineffective assistance of counsel, Defendant must demonstrate that: "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced defendant." *People v Heft*, 299 Mich App 69; 829 NW2d 266 (2012). To establish that defense counsel's representation fell below an objective standard of reasonableness, a defendant must show that counsel's conduct was outside the scope of professionally competent assistance under the circumstances. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). To prove that defense counsel's deficient performance prejudiced the defendant, the defendant must show that the outcome of the proceeding would have been different but for defense counsel's errors. *Heft*, 299 Mich App at 81. Defendant bears a heavy burden of proving ineffective assistance of counsel because there is a strong presumption that defense counsel provided adequate representation. *Vaughn*, 491 Mich at 670. An appellate court may not substitute its own judgment for that of defense counsel or second-guess defense counsel on matters of trial strategy, as defense counsel has great discretion with respect to the trial tactics that he employs while trying a case. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on

other grounds 493 Mich 864; 820 NW2d 922 (2012). A defendant has the burden to establish the factual predicate for his ineffective assistance of counsel claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In his first three issues raised before this Court, Defendant-Appellant identifies a number of areas in which he claims his trial counsel provided ineffective assistance of counsel. He additionally claims that his appellate counsel provided ineffective assistance by failing to raise the issue of ineffective assistance of trial counsel in the court of appeals, and argues that both counsel failed to file necessary motions, failed to investigate properly, and failed to present witnesses and documentary evidence that would have affected the outcome of his trial. Finally, Defendant argues that the trial court erred in failing to order remand for a *Ginther* hearing to develop the record to show his counsel was ineffective.

Ineffective Assistance of Appellate Counsel

"[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel." *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). Therefore, a defendant asserting a claim of ineffective assistance of appellate counsel "must show that his appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal." *Id*.

(1). Defendant first argues that appellate counsel was ineffective for failing to file motions for a new trial and evidentiary hearing in the trial court, raising the issue of ineffective assistance of trial counsel. This argument fails, however, as Defendant himself filed such a motion in the trial court followed by a supplemental motion filed by appellate counsel. The trial court denied the request for an evidentiary hearing and denied the motion for new trial. (Opinion on Motion for

New Trial entered October 15, 2014 (circuit court no. 13-032919-FH) attached as Appendix 4. Defendant raised the same issues he now raises before this Court: that trial counsel was ineffective in failing to investigate, interview and present witnesses at trial. *Id*.

The trial court found that Defendant was able to present evidence that he was the owner of a home located at 2111 Illinois Avenue, Flint, and that during the incident in question he acted in defense of his daughter and then of himself to repel attacks from Shamark Woodward. *Id*. The court found that Defendant was able to effectively present evidence about his home ownership and self-defense and that any additional evidence would have been merely cumulative, thus rendering any error in failing to present additional evidence to be harmless. *Id*. The trial court chose not to interfere with the jury's credibility findings nor to second guess the tactical decisions made by defense counsel simply because he was convicted. *Id*., citing *People v Carbin*, 463 Mich 590; 623 NW2d 884 (2001); *People v Grant*, 470 Mich 477; 684 NW2d 686 (2004).

The trial court further addressed another of the issues Defendant now raises on appeal, that he was deprived of a fair trial because one of the jurors was also a student at Mott College at the same time both Shamark Woodward and Diamond Denson were students there. See *Id*. The trial court found that it was merely speculation by Defendant that the juror's failure to disclose he was a student at Mott College resulted in prejudice to Defendant. The court stated, "Just because individuals are within a common community does not mean they know each other or have bias or prejudice or sympathy." *Id.* The court found no probability that the allegations of inadequate representation resulted in a different outcome than had the other evidence identified by Defendant been presented. *Id.*

Counsel was not ineffective for failing to file a motion for new trial when such a motion was actually filed, argued, and adjudicated by the trial court.

(2) through (5). Next, Defendant argues that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness as an issue on direct appeal, failing to request remand for a *Ginther* hearing, and failure to file Defendant's supplemental pleadings that raise the same arguments made both in his motion for new trial and raised now before this Court. The arguments include that appellate counsel was ineffective by failing to investigate by considering documents and interviewing witnesses identified by Defendant. Defendant claims that he provided a list of witnesses to appellate counsel along with affidavits from the potential witnesses. Defendant argues that these witnesses possessed evidence of medical injuries, wounds sustained by Defendant during the incident, and proof of residency, all of which would have substantiated Defendant's claims and defenses. (Defendant-Appellant's Application, Issue I, p 4).

"A defendant raising a claim of ineffective assistance of counsel bears the burden of proving the factual predicate of his or her claim." *People v Stokes*, 312 Mich App 181, 205; 877 NW2d 752 (2015). Further, the failure to interview witnesses or investigate evidence does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). "The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. Similarly, the failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (internal quotations and citation omitted).

Defendant's argument fails for several reasons. First, appellate counsel could not be ineffective in failing to investigate or interview witnesses because Defendant gave him the documents he claims were not obtained and provided affidavits from the witnesses he complains were not interviewed, indicating their knowledge and potential testimony. There simply was

nothing further to investigate. Second, while Defendant clearly felt he was convicted because his trial counsel did not present additional evidence of his claim of residency and because he did not provide enough evidence of his claimed injuries, the testimony and evidence admitted at trial belie that belief.

Defendant has Failed to Establish Prejudice

Any error by counsel did not affect the outcome of the proceedings due to the strength of the evidence against Defendant. Defendant testified along with his wife and daughter alleging that he acted in defense of his daughter and himself, that he used only that force necessary to repel an attack by Woodward, that he left the scene of the crime only to attempt to contact the police and seek medical attention, and then returned to the scene. Woodward testified that defendant came home and caught him and the defendant's daughter in the midst of being "intimate." (TT I, 144-145, 148). Woodward described in detail how the defendant controlled him and taunted him (TT I, 152-155), kicked him in the face and in the side of the head (TT I, 151, 153-154), struck him with his fists (TT I, 150-151), smashed a lamp over his head (TT I, 151), and then proceeded to use a knife to carve long lacerations into his shoulder, back and legs (TT I, 153), before kicking him out of the house without his phone. Woodward showed the scars on his back to the jury. (TT I, 160-164). Woodward testified that he received 8 staples to close the wounds to his head, and 21 stitches to close the lacerations. (TT II, 8). Woodward identified photos of his injuries taken by his mother after treatment, all of which were admitted into evidence. (TT II, 12-19). Both Woodward's mother and Dr. Mawri testified as to the wounds Woodward suffered as a result of defendant's attack (TT II, 90-91, 95-96, 100-102, 111, 121-123, 140-142), and photos of the cuts were admitted into evidence at trial. These wounds corroborated Woodward's testimony and belied defendant's and his daughter's version of events. Defendant simply had no explanation as

to how Woodward suffered his injuries within the context of Defendant's explanation and claim of self-defense.

Furthermore, defendant's parole officer, Jerry Dennis, testified that defendant admitted kicking Woodward in the back of the head and the face and shattering a lamp over his head. (TT VI, 69-70). Defendant admitted to him that he possessed a knife during the assault (TT VI, 70-71), and defendant's version did not match up with the knife wounds suffered by Woodward. In other words, due to the nature of Woodward's injuries, Woodward's testimony was solidly corroborated and any minor errors by the trial court did not undermine the wide latitude the jury had to either disbelieve defendant and his daughter altogether or to believe defendant initially acted with a belief that defense of his daughter was necessary but carried his use of force well beyond that necessary to repel an attack and intentionally caused great bodily harm to Woodward.

Defendant argues as if the jury's verdict hinged on their belief that he either had a right to self-defense or he did not, and that the claimed errors resulted in the jury's complete belief in Woodward's testimony. But it is equally possible that the jury believed Defendant began to assault Woodward in a lawful exercise of self-defense which evolved into a battery out of rage and resulted in excessive force that was not justified. This result is possible whether the jury believed Defendant was in his own home or not. The jury could have accepted everything Defendant said—and everything that his proposed documentary evidence and additional witness testimony might have provided—but still found due to the unimpeachable physical injuries to Woodward's back that Defendant was guilty of assault with intent to commit great bodily harm.

The jury was free to conclude that the defendant's version of events was not credible. He did not report the alleged assault immediately (TT V, 117; TT VI, 15, 19, 42, 71), nor did his daughter when she spoke to Ofc. Kendall (TT VI, 88-81). Defendant did not report having suffered

any injuries and did not show any evidence of injury to the police or to his parole officer, Jerry Dennis. (TT VI, 43, 72). Indeed, even his "affidavit," as detailed as it is, does not say anything about causing or receiving knife wounds, particularly to Defendant's hand; he says nothing about being further injured or about receiving medical attention from anyone. (See "Affidavit," Appendix 3). And defendant did not make a complaint about an assault of his own person during which Woodward allegedly cut him with a knife and broke one of his fingers.

Defendant did admit on cross-examination that after he allegedly pulled Woodward off of his daughter, he "probably" kicked and stomped on Woodward. (TT V, 90-92). He is sure that he beat Woodward with his fists and broke a lamp over Woodward's head. (Id.) Indeed, when asked if he beat Woodward with a shoe, defendant testified that "I don't know what all I beat him with." (TT V, 91). It was not irrational for the jury to find that any alleged threat of harm to the defendant or his family was not present or imminent and, even if so, the use of force by defendant was excessive or motivated by rage as opposed to a desire to provide protection.

To the extent defendant offered testimony on his own behalf, from himself and others, the jury was free to disbelieve this testimony, and this Court should "not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

The jury obviously believed Woodward's testimony and rejected defendant's version and his claim of self-defense. This Court should not interfere with the jury's determination of the weight of the evidence or credibility of the witnesses. *People v Hardiman*, 466 Mich 417, 431; 646 NW2d 158 (2002); *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

In Issue I, Defendant complains that his appellate counsel was ineffective in failing to appeal the trial court's denial of the motion for new trial and the factual findings that (1) trial

counsel proceeded competently and (2) even had trial counsel introduced the additional evidence presented after the fact by Defendant, it would not have changed the outcome of the trial. Appellate counsel made a strategic decision not to argue ineffective assistance of counsel and to focus instead on the seven issues raised in his brief on appeal in the court of appeals. Appellate counsel need not raise every possible appellate claim, and may be selective as a matter of discretion and strategy when choosing which meritorious issues to raise on appeal. *People v Reed,* 449 Mich 375, 397, 391, 405; 535 NW2d 496 (1996). An attorney is not required to raise futile arguments nor advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Trial counsel made a choice and pursued a reasonable defense. While trial counsel's strategy did not work, it does not render him ineffective as counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

II. Defendant failed to raise the issue of ineffective assistance of trial counsel before the court of appeals. This issue was therefore abandoned and Defendant cannot now raise it on direct appeal before this court. Nonetheless, for the reasons addressed in Issue I, appellate counsel was not ineffective in failing to raise the issue on appeal and Defendant suffered no prejudice.

a. Issue Preservation

Defendant raised an allegation of ineffective assistance of counsel in the trial court by filing a motion for new trial and requesting a *Ginther* hearing. The issue was thus preserved for appeal. *Petri*, 297 Mich App at 410. Nonetheless, Defendant did not raise the issue in the court of appeals and the challenge to the effectiveness of his trial counsel was abandoned on appeal. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422, 432 (1993) (issues raised for first time on appeal in Supreme Court not ordinarily subject to review). To the extent this issue relates to Defendant's claim of ineffective assistance of appellate counsel, the People rely on their argument in Issue I, *supra*. Should this Court entertain the issue as raised for the first time on appeal before this Court, the issue was not preserved and should be subject to plain error review.

b. Standard of Review

"A claim of ineffective assistance of counsel is a mixed question of law and fact." *Petri*, 297 Mich App at 410. On preserved claims of ineffective assistance of counsel where the trial court finds certain facts in relation to a claim of ineffective assistance of counsel, those findings are reviewed for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Whether the facts establish ineffective assistance of counsel involves a question of constitutional law, which is reviewed *de novo*. *Id.*

c. Argument

In order to prove that defense counsel provided ineffective assistance of counsel, Defendant must demonstrate that: "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced defendant." *People v Heft*, 299 Mich App 69; 829 NW2d 266 (2012). To establish that defense counsel's representation fell below an objective standard of reasonableness, a defendant must show that counsel's conduct was outside the scope of professionally competent assistance under the circumstances. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). To prove that defense counsel's deficient performance prejudiced the defendant, the defendant must show that the outcome of the proceeding would have been different but for defense counsel's errors. *Heft*, 299 Mich App at 81. Defendant bears a heavy burden of proving ineffective assistance of counsel because there is a strong presumption that defense counsel provided adequate representation. *Vaughn*, 491 Mich at 670. An appellate court may not substitute its own judgment for that of defense counsel or second-guess defense counsel on matters of trial strategy, as defense counsel has great discretion with respect to the trial tactics that he employs while trying a case. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864; 820 NW2d 922 (2012). A defendant has the burden to establish the factual predicate for his ineffective assistance of counsel claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

As Defendant has abandoned this claim on appeal, the Court should not consider this issue independent of Issue I. Nonetheless, the People contend that the trial court did not err in denying Defendant's motion for new trial or its finding that trial counsel was not constitutionally ineffective. The People submit that trial counsel mounted a vigorous, spirited defense and did not act below the standard of reasonably competent counsel. Even if counsel should have taken some of the actions set forth by Defendant, there was no prejudice as the outcome of the trial would have been the same. (See argument, *supra*, pp. 20-22).

Addressing some of Defendant's specific points, the issue of whether Defendant owned the home at 2111 Illinois Avenue was irrelevant. This is not a case where the duty to retreat played any meaningful role. Defendant either acted with reasonable force in defense of his daughter and himself or he exceeded the amount of force reasonably necessary. Either that, or the jury believed the entirety of Woodward's testimony and found Defendant did not act at all in self-defense.

The "Affidavit" was not admissible evidence, as it was simply Defendant's own self-serving hearsay statement typed up in anticipation of being charged with a crime. It added nothing to whether Defendant resided at the house where the incident took place and did not explain Woodward's knife wounds to his back nor acknowledge any knife wounds to Defendant as he claimed in his trial testimony. It simply would not have affected the outcome of the trial.

Finally, Sergeant Cate's police report was not admissible and particularly would be unremarkable for being silent as to whether he observed any injuries to Defendant.

None of the errors alleged by Defendant in his Application for Leave to Appeal negate the fact that Defendant presented a substantial defense that would not have been improved upon even had counsel taken the steps now urged by Defendant.

III. The trial court did not abuse its discretion when it ruled on Defendant's motion for new trial without first holding an evidentiary hearing. The trial court found that even if defense counsel's performance fell below an objective standard of reasonableness, Defendant suffered no prejudice from the mistakes alleged by Defendant.

a. Issue Preservation

This issue was preserved in the trial court by Defendant's request for a *Ginther* hearing as part of his motion for new trial. Nonetheless, the issue was abandoned on appeal by Defendant's failure to raise it in the court of appeals. *Booth Newspapers*, 444 Mich at 234. To the extent this issue relates to Defendant's claim of ineffective assistance of appellate counsel, the People rely on their argument in Issue I, *supra*. Should this Court entertain the issue as raised for the first time on appeal before this Court, the issue was not preserved and should be subject to plain error review.

b. Standard of Review

"[A] trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion." *People v Unger*, 278 Mich App 210, 216–217; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217.

Unpreserved issues are reviewed for plain error affecting Defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

c. Argument

In support of this argument, Defendant argues the same issues that were argued before the trial court and those he presents in support of his claims of ineffective assistance of counsel. Because it was apparent from the record that those alleged examples of unreasonable representation did not cause prejudice to Defendant and did not affect the outcome of the trial, (see Issue I, supra, pp 20-22), Defendant cannot establish that the trial court's failure to hold an evidentiary hearing on the motion for new trial was an abuse of discretion. There was no plain error and the lack of an evidentiary hearing did not affect the outcome of the trial.

IV. The trial court did not abuse its discretion when it found that Christina Delikta was not qualified, based on a lack of education, training, and experience, to testify as an expert witness to opine on why victims of sexual assault feel guilty and say they are sorry.

a. Issue Preservation

Defendant offered witness Christina Delikta as an expert witness at trial. Following voir dire by the prosecutor, the trial court declined to qualify Ms. Delikta as an expert witness. As the issue was properly raised before the trial court, this issue is preserved for appeal.

b. Standard of Review

The preliminary determination of the qualification of an expert is an issue for the trial court to decide. *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 780; 685 NW2d 391 (2004). Thus, the qualification of a witness as an expert and the admissibility of the testimony of the witness are in the trial court's discretion and are reviewed for an abuse of that discretion. *Woodard v Custer,* 476 Mich 545, 557; 719 NW2d 842 (2006). An abuse of discretion exists if the decision results in an outcome outside the range of principled outcomes. *Id.*

c. Argument

> MRE 702 governs the qualification of expert witnesses for the purpose of offering testimony at trial. Under MRE 702, an expert may not testify unless the trial court first determines that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" **and the expert witness is "qualified as an expert by knowledge, skill, experience, training, or education...."** Based on the language of MRE 702 and MRE 104(a), which requires trial courts to determine preliminary questions concerning the qualification of a person to be a witness, trial courts have an obligation to exercise their discretion as a gatekeeper and ensure that any expert testimony admitted at trial is reliable. *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 780; 685 NW2d 391 (2004).
>
> > This gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion

> rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id.* at 782, 685 NW2d 391 (emphasis in original).]

People v Yost, 278 Mich App 341, 393-94, 749 NW2d 753, 786 (2008) (emphasis added).

Defendant argues that the trial court erred when it refused to qualify Christina Delikta as an expert witness to express her opinion as to why a sexual assault victim would feel guilty and say they were sorry. Ms. Delikta testified as to her qualifications. At the time of trial, she had been a sexual assault crisis counselor at the YWCA in Flint for two years. (TT V, 7). For the three years prior to that, she had worked in the "family reunification program" at the Judson Center, providing in-home services for families where a child had been removed by the courts and was being re-unified with their family. She would help the family make adjustments to provide a safe and healthy environment for the child. (TT V, 7-8). Prior to that job, she worked as a counselor at the Whaley Children's Center, working with youth age 8-14 and practicing group therapy. She also would perform one-on-one intervention when she noticed a child having emotional struggles. (TT V, 8-9).

As far as education, Ms. Delikta held a Bachelor's Degree in family life education from Spring Arbor University, which she described as similar to a social work or psychology degree. The family life education degree focuses on how the family works together. (TT V, 9).

The trial court ruled that defendant had not laid a foundation for Ms. Delikta to be qualified as an expert witness in the reaction of sexual assault victims. (TT V, 11-12). The witness did not elaborate on any coursework or study or any further experience in sexual assault counseling that would qualify her to provide expert testimony with respect to sexual assault counseling. Instead, defendant relied upon her two years as a sexual assault crisis counselor. (TT V, 12). The court

explained that Ms. Delikta had no specialized degree, no specialized training and only two years' experience in a field that was quite new to her and based on those qualifications, she was not an expert. (Id.).

This ruling was not outside the range of principled outcomes. Defendant presented a witness with a degree in family life education that focuses on the workings of the family unit. She did not testify to receiving any training or study in the reactions of sexual assault victims and basically presented only two years' experience as a sexual assault crisis counselor without reference to case load or type of sexual assault with which she has been involved. Moreover, there was no testimony or even offer of proof as to methodology or reliability that would lead to a conclusion as to the common reactions of sexual assault victims.

Given the dearth of evidence of Ms. Delikta's qualifications, it was not an abuse of discretion for the court to rule her unqualified to provide expert testimony under MRE 702.

V. The trial court properly instructed the jury as to evidence of flight where defendant fled the crime scene and did not immediately report the alleged assault on his daughter until he was confronted by his parole agent two days later.

a. Issue Preservation

Defendant objected at trial to the court instructing the jury on how to evaluate evidence of flight. The court of appeals considered this issue and affirmed. Thus, this issue is preserved for appeal.

b. Standard of Review

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez,* 463 Mich 466, 472; 620 NW2d 13 (2000). This Court reviews jury instructions as a whole to determine whether error requiring reversal occurred. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546, 564 (2007). Reversal is not required if the jury instructions fairly present the issues and sufficiently protect the defendant's rights. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

c. Argument

Evidence of flight from the scene of a crime is admissible to support an inference of a defendant's consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008); *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Although flight evidence does not necessarily prove

consciousness of guilt, as one might leave the scene of a crime for other reasons, "evidence of flight is generally relevant and admissible." *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993). Whether a defendant left the scene for reasons other than consciousness of guilt affects the weight of the evidence, not its admissibility. *See Unger*, 278 Mich App at 226. While "[i]t is true that flight from the scene of a tragedy may be as consistent with innocence as with guilt; . . . it is always for the jury to say whether it is under such circumstances as to establish guilt." *People v Cipriano*, 238 Mich 332, 336; 213 NW2d 104 (1927).

Defendant argues that the trial court erred when it instructed the jury that the fact defendant left the scene of the crime may be evidence of consciousness of guilt. CJI2d 4.4. Defendant argues factually that the evidence showed he left the scene to make a police report and to receive medical attention. It is true that defendant testified that he left the scene and went to the Flint Police Department to tell them what had just happened. (TT V, 62). Defendant testified that no one answered the door at the police station so he rode with his sister to her house on 10th Street, where defendant claimed that he collapsed with a seizure and a panic attack. (TT V, 63). After he recovered from that, he had his sister take him back to the house on Illinois Ave. where the crime occurred. (TT V, 64). Defendant further argues that evidence of flight was absent because he turned himself in to be arrested.

While it is true that defendant so testified, the argument ignores the evidence presented by the People that defendant fled the scene of the crime and did not, in fact, turn himself in to the police. Defendant admitted that he left the scene of the crime with his sister to go to a different address, although he claimed to have lived at the address on Illinois. Defendant's 12-year-old son, Tmando Allen Denson-El, Jr., testified that he lived at 2111 Illinois Avenue with his mother, his sister and his brother. (TT II, 199). On the evening of October 22, 2012, he was watching the

Lions football game with his brother. (TT II, 198-199). Tmando, Jr. called defendant on the phone and told him the Lions' game was coming on and defendant said he was coming. (TT II, 199). Significantly, when asked who else lived in the house with him, Tmando, Jr. did not name his father, and he called his father to come to the house to watch the football game.

Moreover, defendant's testimony was contradicted by his parole officer, Jerry Dennis.[6] Mr. Dennis testified that he didn't receive a phone call from defendant about the incident with Woodward until October 24, 2012 (TT VI, 39), which was two days after the incident occurred. Contrary to defendant's testimony, defendant did not leave him a phone message about the incident. (TT VI, 39-40). Defendant told him of the incident over the phone, and Mr. Dennis asked defendant to come in to see him. (TT VI, 39). Mr. Dennis's testimony belied defendant's version that he turned himself in for arrest, as Mr. Dennis stated that he asked defendant to come in to see him but did not tell defendant he was going to arrest him. (TT VI, 40). Mr. Dennis testified that defendant did not surrender himself as he did not know he would be arrested. (Id.).

When they met, defendant told Mr. Dennis about the incident. Contrary to defendant's trial testimony, defendant told Mr. Dennis he did not contact the police the night of the incident because he did not want to have police contact. (TT VI, 42, 71). Mr. Dennis testified that defendant did not live at the house on Illinois, but at an apartment at 524 10th Street. (TT VI, 42-43). Defendant said that after the incident, he went back to his apartment. (TT VI, 42). In his face-to-face meeting with defendant, defendant did not report that he had been injured and Mr. Dennis did not observe any injuries. (TT VI, 43).

Defendant reported that Woodward was an unknown male and admitted he had kicked Woodward in the back of the head and in the face. (TT VI, 69). Defendant also told Mr. Dennis

[6] The fact that Jerry Dennis was a parole officer was not admitted at trial.

that he shattered a lamp over Woodward's head. (TT VI, 70). Woodward threw a glass of water in his face and because Woodward grabbed a steak knife in the kitchen, defendant picked one up too. (TT VI, 70). Woodward threw his knife at defendant, so defendant threw his knife back at Woodward. (TT VI, 70-71). At the end of the fight, Woodward slid down onto the floor and defendant told him not to move, but he didn't call the police because he didn't want police contact. (TT VI, 71). Instead, defendant called his sister, who came over immediately. (Id.). Defendant escorted Woodward out of the house and then went back inside to check on his daughter. (TT VI, 72). Defendant did not tell Mr. Dennis that his daughter was panicked and unable to talk and he did not say anything about being injured himself. (TT VI, 72). Defendant said he got into the car with his sister and went back to his apartment. (TT VI, 72).

The trial court instructed the jury according to the standard jury instruction on flight, which cautions the jury that flight evidence, standing alone, is not sufficient to prove guilt, because an individual may flee for innocent reasons, such as panic, mistake or fear. And the instruction provides that the jury "must decide whether the evidence is true and whether it shows that the defendant had a guilty state of mind." CJI2d 4.4. The jury was instructed consistently with the standard instruction. (TT VII, 91-92).

Thus, the trial testimony presented evidence from which the jury could find that by leaving the scene of his assault of Woodward and going back to his apartment without contacting the police defendant displayed a consciousness of guilt. The instruction fairly presented the issue of flight to the jury, leaving to them to determine whether defendant's leaving the scene implied consciousness of guilt or was for some innocent reason. The evidence supported giving the instruction on flight and, thus, the trial court did not abuse its discretion.

VI. Defendant was not denied the right to an impartial jury merely because one juror attended Mott college at the same time Shamark Woodward and Diamond Denson were high school students there. The juror did not improperly fail to disclose during voir dire that he was a student at Mott College when the question was never asked and Defendant has failed to present evidence that the juror knew any of the witnesses or was biased toward or against either party.

a. Issue Preservation

This issue was preserved in the trial court by Defendant's request for a *Ginther* hearing as part of his motion for new trial. Nonetheless, the issue was abandoned on appeal by Defendant's failure to raise it in the court of appeals. *Booth Newspapers*, 444 Mich at 234. To the extent this issue relates to Defendant's claim of ineffective assistance of appellate counsel, the People rely on their argument in Issue I, *supra*. Should this Court entertain the issue as raised for the first time on appeal before this Court, the issue was not preserved and should be subject to plain error review.

b. Standard of Review

Unpreserved issues are reviewed for plain error affecting Defendant's substantial rights. *Carines*, 460 Mich at 763. To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*

c. Argument

Defendant complains that he was denied his right to be tried by an impartial jury when he was prevented from intelligently exercising his peremptory challenges and challenges for cause during voir dire because one of the jurors failed to disclose that he was a student at Mott College at the same time as Shamark Woodward and Diamond Denson. He refers to several affidavits in which his relatives claim to know that the juror in question attended the school and one who claims the juror apologized for the verdict upon seeing Diamond Denson after the trial had been

concluded. Even if all these factual averments were true, however, there is no evidence that the juror gave false or misleading information during voir dire, that he knew any of the witnesses, or that he had any bias toward or against any of the parties or witnesses. This issue was raised before the trial court in Defendant's motion for new trial and the trial court found a lack of evidence of bias or prejudice or sympathy on behalf of the juror.

Defendant fails to support this argument with any law or facts that establish he did not have a fair and impartial jury. Thus, even were this issue properly before this Court, Defendant has failed to show any error, plain or otherwise, or that there was any outcome-determinative prejudice.

VII. The special assistant prosecutor did not engage in prosecutorial misconduct and did not suppress exculpatory evidence. Defendant did not preserve this claim and does not set forth law and facts to support a claim that the prosecutor committed error or misconduct.

a. Issue Preservation

"In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defendant did not object in the trial court to the prosecution's alleged failure to investigate the case or to suborn perjury of Jerry Dennis. Furthermore, Defendant failed to raise these claims in the court of appeals. The issue is not properly before this Court. To the extent this issue relates to Defendant's claim of ineffective assistance of appellate counsel, the People rely on their argument in Issue I, *supra*. Should this Court entertain the issue as raised for the first time on appeal before this Court, the issue was not preserved and should be subject to plain error review.

b. Standard of Review

Allegations of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the prosecutor's statements and actions, taken in context, deprived the defendant of a fair and impartial trial. *Id.* at 382-383. As Defendant's argument is unpreserved, review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To demonstrate plain error, Defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 763. Even if a defendant establishes a plain error that affected his substantial rights, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness,

integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763–764 (quotation marks and citation omitted; second alteration in original).

c. Argument

"Prosecutors . . . have a duty to see that defendants receive a fair trial while attempting to convict those guilty of crimes." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Defendant fails to establish that there was any misconduct or error committed by the prosecutor that prevented him from receiving a fair trial.

Defendant's argument is by reference to his "Supplemental Brief" at pages 35-39. The argument has two parts: first, that the prosecutor and officer in charge, Sergeant Jason Cate, were made aware of by Defendant and failed to investigate various exculpatory facts and evidence in the form of potential witnesses, medical records, knives, holes in the wall, etc., and a document entitled "'Judicial Notice' Affidavit/Statement of Facts; Complaint" dated October 23, 2012 (see Appendix 3); and second, that the prosecutor allowed parole agent Jerry Dennis to commit perjury because Defendant was not allowed to impeach him with Defendant's own "affidavit." Defendant acknowledges in his argument that he was aware of this allegedly exculpatory evidence. He does not explain how the prosecutor deprived him of a fair trial.

Regarding the claim that the People failed to properly investigate the identified evidence, the prosecution does not have a duty to search for evidence to aid Defendant's case; rather, its duty is to share evidence that is discovered. *People v Burwick*, 450 Mich 281, 289, n 10; 537 NW2d 813 (1995). And, while the failure to turn over exculpatory evidence would constitute prosecutorial misconduct, *People v Leo*, 188 Mich App 417, 426–427; 470 NW2d 423 (1991), Defendant fails to identify any exculpatory evidence that the prosecution failed to turn over. Accordingly, Defendant fails to establish plain error affecting his substantial rights.

The second part of Defendant's claim rests on the fact that Defendant told Jerry Dennis certain facts. Defendant's statements were hearsay, without exception. At trial, Defendant took the stand and testified as to his version of events. He also testified that he told Jerry Dennis the facts that he supplied in his "affidavit" and that Dennis's testimony as to what Defendant told him was incorrect. The information provided to Jerry Dennis on October 24, 2012, two days after the incident took place, was not reliable. Defendant starts out his "affidavit" by citing law regarding self-defense and includes later in the document that he had no legal duty to retreat. Then Defendant includes facts that would potentially support such a defense. The affidavit was either an attempt to testify and establish a defense without having to take the stand or meant to bolster his own credibility. But it was inadmissible hearsay in any event.

Defendant fails to make any legal argument to support his claim of prosecutorial misconduct. Should this Court entertain this argument, there was no plain error in the prosecutor's conduct identified by Defendant.

VIII. Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible when relevant to establish any purpose other than that the defendant committed the present crime because he is a person of bad character. Admission of defendant's prior act of anger and use of excessive force were admissible under MRE 404(b) as material and relevant to prove that the intent and modus operandi related to defendant's claim of self-defense was not believable. Defendant's bad temper was corroborative of Woodward's testimony that defendant reacted in anger and assaulted him with excessive force in this case.

a. Issue Preservation

Defendant objected to the use of other acts evidence under MRE 404(b). Thus, this issue was preserved for appeal. Furthermore, Defendant presented this argument to the court of appeals.

b. Standard of Review

"The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

c. Court of Appeals Ruling

The court of appeals considered this issue and held that the trial court acted within its discretion when it admitted the evidence regarding Defendant's 2002 assault of Tyrone Bush, which was used to contradict Defendant's self-defense theory. *People v Denson*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2015 (Docket No. 321200). (Appendix 1.) As the court of appeals found, these facts "had significant probative value toward contradicting the significant testimony that defendant introduced in support of [his] primary defense theory." *Id*., slip op at 5. The People would submit that the court of appeals was correct

and admission of the evidence was not an abuse of discretion. In addition to the reasoning of the court of appeals, the People additionally argue that Defendant admitted the assault upon Woodward, but he challenged the intent and claimed a justification. Therefore the prior example of Defendant's bad temper and reaction to stressful confrontation was relevant to the jury in this case to evaluate and determine his intent in committing the assaultive actions against Shamark Woodward.

d. Argument

MRE 404(b) prohibits the admission of evidence of "other crimes, wrongs, or acts to . . . prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). See also *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Although other-acts evidence may not be used to demonstrate a person's character or propensity to commit a crime, it may be admissible for other purposes, including, for example, proof of intent or knowledge. MRE 404(b)(1). To introduce evidence under MRE 404(b):

> First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402 . . . ." Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.
> *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004) (citations omitted).

Under this framework, the first question to be addressed is whether the prosecutor has articulated a proper non-character purpose for the admission of the evidence in question. *Crawford*, 458 Mich at 385. A proper purpose for the admission of other-acts evidence is one that seeks to accomplish something other than establishing the defendant's character or propensity to commit the offense. *People v Magyar*, 250 Mich App 408, 414; 648 NW2d 215 (2002). A mere "mechanical recitation" of a proper purpose does not, however, justify admission of other-acts evidence. *Crawford*, 458 Mich at 387. Rather, the prosecutor also bears the burden of showing

that the evidence is logically relevant to a proper purpose. *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010).

To be relevant, evidence must be both material and probative. *Crawford*, 458 Mich at 388. To be material, the evidence must relate to "any fact that is of consequence to the action." *Id.* (citation omitted). Whether the evidence also has probative value depends on "whether the proffered evidence tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 389-390, quoting MRE 401. The relevance of the evidence depends to varying degrees on the similarity between a defendant's prior bad acts and current offense. See *Id.* at 395-396 & n 13. "Different theories of relevance require different degrees of similarity between past acts and the charged offense to warrant admission." *Mardlin*, 487 Mich at 622. For example, "[w]hen other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.'" *People v VanderVliet*, 444 Mich 52, 79-80; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In other words, "mere similarity" between the acts will suffice when the other-acts evidence is offered to establish an actor's intent. *Sabin (After Remand)*, 463 Mich at 64 (citation omitted).

The people filed a proper notice under MRE 404(b) on May 9, 2013, indicating that the prosecutor intended to introduce the facts underlying defendant's prior 2002 conviction for assault with intent to commit great bodily harm "[f]or the purpose of proving absence of self-defense or defense of others, absence of mistake, modus operandi, scheme plan and knowledge." The prosecutor did not, however, introduce this evidence during his case in chief. On January 23, 2014, the second day of trial, after the people rested, defendant made an objection on the record to the introduction of any evidence of defendant's prior criminal record. (TT II, 144). Defendant

objected that the evidence was not relevant and would be more prejudicial than probative. (Id.). The prosecutor explained the materiality and relevance of the evidence. (TT II, 145-46). At trial, defendant was claiming that he was acting in self-defense or defense of his children. The fact that defendant is a person quick to anger, who loses control and uses excessive force is contrary to his asserted intention and motive in the actions taken in the present case. It was not an argument that defendant has committed a crime in the past, that he is of bad character, and thus he must have committed the present crime. The common scheme in committing an act went to his intent and motivation, both of which were relevant to his claim of self-defense. The trial court ruled that the facts of the previous assault that arose from an argument were admissible as evidence that defendant "has some kind of temper or that he had bad judgment or something like that." (TT II, 149). The prosecutor was precluded from mentioning that defendant was still on parole at the time of the present offense or that defendant was convicted as a result of the prior act. (TT II, 148-49).

A major issue of contention between the parties in this case was whether defendant struck, punched, kicked, and stomped Woodward while exercising self-defense or out of anger at Woodward for being alone with defendant's daughter in her bedroom without her father knowing it. A key component of the people's argument was that defendant reacted with a quick temper in anger and swift and excessive force, far beyond any alleged danger posed to his daughter or himself, even if he initially may have felt his daughter was threatened. The evidence showed that defendant: (1) assaulted Woodward because Woodward was being "intimate" with his daughter; (2) threatened to have his "homeboys" handle it (TT I, 154); and (3) used excessive force based on emotion. The evidence was not used to argue that defendant committed the crime charged in this case because he is a person of bad character. Moreover, the evidence corroborates Woodward's story in the face of defendant's flat out denial and where defendant, his daughter and

wife denied the existence of his bad temper. Whether defendant had a "bad temper" was material and relevant to that factual dispute.

During defendant's case-in-chief, defendant's daughter, Diamond Denson, testified on cross examination that she had a temper and defendant also had a temper. (TT III, 114, 151). And on re-direct, defense counsel emphasized through Diamond's testimony that she did not say she or her father had a "bad" temper, merely that they "have a temper." (TT IV, 20-21). Defendant's wife, Rosemary Denson, testified that defendant did not have a bad temper. (TT IV, 111-112). And defendant denied that he had a bad temper. (TT V, 108, 131). Thus, the facts of the prior act, that he settled an argument with another man by resort to his violent and sudden temper, shooting the man in the stomach as the man tried to retreat into the safety of his home, was relevant to the parties' contentions in the present case.

During cross examination of Rosemary Denson, she denied that defendant has a bad temper or easily loses control. In response, the prosecutor asked whether she was aware that defendant, her husband, had gotten into trouble in Detroit and that all her children were aware of that incident. (TT IV, 112). She acknowledged that was true.

When defendant testified, he denied that he lost his temper with Woodward and attacked him out of anger. In fact, defendant claimed he fought Woodward first to protect his daughter, second to defend himself, and third to protect his sons who were in the basement at the time of the incident. On cross examination, the prosecutor established that in the past defendant had a dispute with a man named Tyrone Bush over money that Mr. Bush owed him. Defendant went to Mr. Bush's house and argued with him outside his house. Mr. Bush tried to retreat back into his house and defendant shot him. (TT V, 105-08). Despite admitting these actions, defendant denied that he had a bad temper. (TT V, 108, 131). The evidence was admitted as relevant to establish that

in the present case, as in the past, defendant acted with the intent to retaliate in anger against a perceived wrong and not for his stated purpose of defending himself or his family.

It is true that the trial court did not engage on the record in an MRE 403 balancing test to determine whether the probative value was substantially outweighed by the danger of unfair prejudice. However, while balancing the probative value against unfair prejudice on the record is preferable, it is not required. *People v Gaines*, 306 Mich App 289, 302 n 8; 856 NW2d 222 (2014). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. Nonetheless, had the trial court engaged in such a discussion, the court would have admitted the evidence, as it did.

Any danger that the jury would convict defendant now because he was a bad person and had committed an assault with a weapon, which force was excessive, did not substantially outweigh the material, probative value that the evidence carried in this case. Defendant presented testimony from his daughter, wife, and himself asserting that he did not have a bad temper and, in fact, only used appropriate force against Woodward to repel a sudden and violent attack against Diamond and himself. Woodward testified that he did not force Diamond to do anything and did not physically oppose defendant, but rather that defendant suddenly and violently attacked him and assaulted Diamond when defendant found them together in Diamond's room. Woodward testified that defendant beat him with fists and kicked him in the head, smashed a lamp over his head and cut him with a knife, even as the 17-year-old victim cowered in the corner of the room. Woodward's injuries were consistent with his version of events and not defendant's. The evidence that defendant has a bad temper and has in the past reacted in a sudden, violent and excessive manner when he feels provoked was relevant to determine defendant's state of mind and *modus*

operandi. The probative value was not outweighed by the danger of unfair prejudice and the evidence was properly admitted. It was not an abuse of discretion.

Finally, the trial court granted defendant's request for a curative instruction. First, the court instructed the jury that any suggestion that a bribe attempt occurred ten years earlier was not relevant and was not to be considered by them in their deliberations.[7] Second, had the defendant requested an instruction as to the limited use of the other acts evidence, the court would have given such an instruction and any slight possibility of prejudice would have been alleviated.

Should this Court find that this evidence was admitted in error, the Court should not reverse defendant's conviction as any error would be harmless. Defendant cannot establish that, more probably than not, the trial court's evidentiary ruling on this matter affected the outcome of his trial. MCL 769.26; *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

MCR 2.613(A) states:

> Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

In this case, even if the jury was improperly informed that defendant has displayed a quick, violent temper in the past, such evidence would not have adversely affected the verdict.

As set forth in the discussion of Issue I, *supra*, pp. 20-22, any error in the admission of the other acts evidence did not affect the outcome of the proceedings due to the strength of the evidence against Defendant, particularly the evidence of the injuries Defendant inflicted to

[7] Defendant argues that the other acts evidence allowed by the trial court included defendant's attempt to bribe his victim from his previous incident involving a quick temper and excessive use of force. But the court only allowed the prosecutor to use evidence of defendant's excessive use of force, not the bribery attempt. In fact, defense counsel requested and received a curative instruction on that point. (TT IV, 99-100, 105-06).

Woodward's back by use of a knife. In other words, due to the nature of Woodward's injuries, Woodward's testimony was solidly corroborated and any minor errors by the trial court did not undermine the wide latitude the jury had to either disbelieve defendant and his daughter altogether or to believe defendant initially acted with a belief that defense of his daughter was necessary but carried his use of force well beyond that necessary to repel an attack and intentionally caused great bodily harm to Woodward.

Thus, any error in admitting the evidence under MRE 404(b) would have been harmless and defendant's conviction should be affirmed.

RELIEF

WHEREFORE, David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Michael A. Tesner, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant-Appellant's Application for Leave to Appeal because the Court of Appeals did not err when affirming Defendant-Appellant's conviction and sentence.

Respectfully Submitted,

DAVID S. LEYTON
PROSECUTING ATTORNEY
GENESEE COUNTY

/s/ Michael A. Tesner
Michael A. Tesner (P 45599)
Assistant Prosecuting Attorney

DATED: July 20, 2016

STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURRAY, P.J., AND METER and OWENS, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TMANDO ALLEN DENSON,

Defendant-Appellant.
_____/

Supreme Court
No. 152916

Court of Appeals
No. 321200

Circuit Court
No. 15-032919-FH

APPENDIX

1. *People v Denson*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2015 (Docket No. 321200).

2. *People v Denson*, order of Michigan Supreme Court, issued June 22, 2016 (Docket No. 152916).

3. Defendant's "Judicial Notice" Affidavit/Statement of Facts; Complaint, dated October 23, 2012.

4. Circuit Court Opinion on Motion for New Trial entered October 15, 2014 (circuit court no. 13-032919-FH).